

BEFORE THE
Federal Communications Commission
WASHINGTON, D.C. 20554

ORIGINAL
FILE

In the Matter of)
)
AMENDMENT OF PARTS 2, 22 and 25)
)
For An Allocation of Frequencies)
and Other Rules For A New)
Nationwide Hybrid Space/Ground)
Cellular Network for Personal/)
Mobile Communications Services)

RM No. 7927

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APR - 8 1992

Federal Communications Commission
Office of the Secretary

To: The Chief Engineer

**PETITION TO DISMISS RULEMAKING
REQUEST OF CELSAT, INC.**

TRW Inc.

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April 8, 1992

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TABLE OF CONTENTS

	<u>Page</u>
Summary	iii
I. Consideration Of CELSAT's Rulemaking Petition Is A Meaningless and Wasteful Exercise Since Any Application Now Filed By CELSAT Which Requested Use of The RDSS Band Frequencies Is Cut-Off and Must Be Dismissed As Unacceptable For Filing. . .	3
A. Any CELSAT Application Seeking Assignment Of RDSS Band Frequencies Would Be Cut-Off. .	3
B. Late Filed Applications Must Be Returned As Unacceptable For Filing	5
C. Well-Established Law and Policy Precludes The Commission From Simply Reopening The Cut-Off Date For The Acceptance Of New Applications	7
D. CELSAT Is Not Eligible For A Waiver Of The Commission's Cut-Off Rule.	9
II. CELSAT's Rulemaking Petition For An Allocation In The Frequencies At 2.1 And 2.4 GHz Is Similarly Ungrantable	12
III. CELSAT's Rulemaking Petition Must Be Dismissed. .	14
CONCLUSION	18

SUMMARY

TRW Inc. requests the dismissal of a Petition for Rulemaking filed by CELSAT, Inc. which seeks exclusive reallocation of spectrum for its contemplated CELSTAR Hybrid Personal Communications Network service. TRW demonstrates that because neither of the alternative frequency allocations can be made available at this time for CELSAT's proposed service, its rulemaking petition must be dismissed as moot.

One of the frequency band pairs requested by CELSAT, the 1610-1626.5 MHz and 2483.5-2500 MHz bands, is allocated domestically to radiodetermination satellite service ("RDSS") use and is currently the subject of several competing applications and rulemaking requests. Because CELSAT did not file an application for these frequencies within a cut-off period established by the Commission in April, 1991, any application which CELSAT might now file for such frequencies would be effectively barred from concurrent consideration with the pending processing group and would be dismissed as unacceptable for filing.

The alternative frequency band pair sought by CELSAT, the 2110-2129 MHz and 2410-2428 MHz bands, was not allocated at the 1992 World Administrative Radio Conference for mobile satellite use on a primary basis and only the 2120-2129 MHz band segment was allocated on a secondary basis for mobile satellite services. Thus, the United States would only be able

to make such frequencies available for mobile satellite use on a non-interfering basis, which would not be satisfactory for a full service satellite system.

Inasmuch as CELSAT's petition for rulemaking is thus completely ungrantable, it should be dismissed without further consideration.

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**PETITION TO DISMISS RULEMAKING
REQUEST OF CELSAT, INC.**

TRW Inc., by its attorneys, hereby respectfully requests that the Commission dismiss as ungrantable the Petition for Rulemaking filed by CELSAT Inc. ("CELSAT") on February 6, 1992. CELSAT's proposal calls alternatively for the use of two sets of frequencies, which for differing reasons are unavailable for its proposed use, and thus any further consideration of CELSAT's proposal at this time would be moot and a waste of the Commission's valuable resources.

As one alternative, CELSAT proposes the use of frequencies at 1610-1626.5 MHz and 2483.5-2500 MHz ("Band-B" or

the "RDSS Band"), which are allocated domestically to the radiodetermination satellite service ("RDSS") and which, as a result of the 1992 World Administrative Radio Conference ("WARC-92"), have now been allocated for mobile satellite use on a co-primary basis. However, any application which might now be filed by CELSAT for use of those frequencies would be mutually exclusive with a number of satellite service proposals which have been pending before the Commission for some time. Because CELSAT did not file an application prior to the June 3, 1991 cut-off date established by the Commission for concurrent consideration with that processing group, its application for use of these frequencies could not be accepted at this time. While CELSAT has requested that the Commission re-open the cut-off period to allow for the filing of its application, it has offered no explanation as to why it failed to timely file an application within the cut-off period, and has offered no compelling reasons why the Commission should deviate from strict enforcement of its well-established cut-off policy.

The other alternative proposed by CELSAT would involve the use of frequencies at 2110-2129 MHz and 2410-2428 MHz ("Band-A"), which it anticipated would be allocated either regionally or on a worldwide basis for generic mobile satellite services at WARC-92. However, events did not develop as CELSAT had anticipated. The "Band-A" frequencies were not allocated internationally for use by mobile satellite services, and

therefore could not be allocated domestically for CELSAT's proposed mobile satellite service on any basis that its pending petition indicates would be acceptable to it.^{1/} As a result, CELSAT's rulemaking proposal is ungrantable, and it should be dismissed without further consideration.

I. Consideration Of CELSAT's Rulemaking Petition Is A Meaningless And Wasteful Exercise Since Any Application Now Filed By CELSAT Which Requested Use of The RDSS Band Frequencies Is Cut-Off And Must Be Dismissed As Unacceptable For Filing.

A. Any CELSAT Application Seeking Assignment Of RDSS Band Frequencies Would Be Cut-Off.

On April 1, 1991, the Commission released a Public Notice finding acceptable for filing applications of Motorola Satellite Communications, Inc. ("Motorola") (File Nos. 9-DSS-P-91(87) and CSS-91-010) and Ellipsat Corporation ("Ellipsat") (File No. 11-DSS-P-91(6)). Motorola and Ellipsat requested the use of frequencies in the 1610-1626.5 MHz and 2483.5-2500 MHz bands for their proposed satellite systems. See Public Notice, 6 FCC Rcd 2083 (1991).

In its Public Notice, the Commission established June 3, 1991 as a cut-off date for the filing of competing applications by parties wishing to use these frequencies. Id. at 2084. In response to the Public Notice, on or before the

^{1/} Presumably, the Commission could authorize the CELSAT proposal for domestic U.S. service on a non-interfering basis.

cut-off date, TRW and three other parties filed applications for satellite systems that would use the RDSS frequencies sought by Motorola and Ellipsat, and Ellipsat filed applications for additional satellites.^{2/}

CELSAT failed to file an application requesting use of the RDSS frequencies before the cut-off date. On February 6, 1992, over 10 months after the release of the Public Notice and over eight months after the cut-off date, CELSAT filed a petition for rulemaking seeking use of this frequency band. To date, however, CELSAT has still not filed an application seeking to implement its request.

^{2/} The applicants filing by the cut-off included: TRW, File Nos. 20-DSS-P-91(12) and CSS-91-015 (Odyssey System); Loral Qualcomm Satellite Services Inc. ("Loral"), File Nos. 19-DSS-P-91(48) and CSS-91-014 (Globalstar System); Constellation Communications, Inc., File Nos. 17-DSS-P-91(48) and CSS-91-013 (Aries System). In addition, Ellipsat submitted additional applications for a second phase system, File No. 18-DSS-P-91(18) (Ellipso II), and AMSC Subsidiary Corp. ("AMSC") amended its domestic generic mobile satellite service ("MSS") application to include frequencies in the RDSS bands on two of its satellites (File Nos. 15-DSS-MP-91 and 16-DSS-MP-91). TRW, Loral, Constellation, Motorola, AMSC and Ellipsat all later filed petitions for rule making in connection with their applications.

**B. Late Filed Applications Must Be Returned As
Unacceptable For Filing.**

Section 25.141(b) of the Commission's Rules states that "each application for a space station in the radiodetermination satellite service shall be placed on public notice A 60-day cut-off period shall also be established for the filing of applications to be considered in conjunction with the original application." 47 C.F.R. § 25.141(b). Accordingly, the Commission's Public Notice of April 1, 1991 (DA 91-407) opened a 60-day cut-off period in which interested parties could file competing applications proposing satellite systems which would make use of frequencies in the 1610-1626.5 MHz and 2483.5-2500 MHz bands. See 6 FCC Rcd at 2084.^{3/}

The Commission specifically stated that "applications that fail to comport with these requirements as of the cut-off date will be dismissed as unacceptable for filing." Id. Furthermore, Section 25.155 of the Commission's Rules states

^{3/} Applicants were requested to file, by June 3, 1991, comprehensive proposals providing all technical, operations, construction and launch information specified in Appendix B of Space Station Application Filing Procedures, 48 Fed. Reg. 40256 (September 6, 1983), and outlining their proposal's compatibility with the RDSS services pursuant to 47 C.F.R. § 25.392(a) & (f). Id. It should be noted that AMSC which, like CELSAT, proposes no RDSS services (see CELSAT Petition at 27), timely filed its competing application for the RDSS frequencies within the specified cut-off period.

that in order to be considered comparatively with conflicting applications, satellite applicants like CELSAT must submit their applications "in a condition acceptable for filing . . . by the 'cut-off' date specified in a public notice . . ."

47 C.F.R. § 25.155(b). Satellite applications which are filed and are not in accordance with the Commission's Rules, such as Section 25.155, may be returned or dismissed. See 47 C.F.R. § 25.150.^{4/}

The Commission has thus made clear that a mutually exclusive application filed after the cut-off period will be dismissed, and will not be considered in conjunction with the

^{4/} The cut-off procedures contained within the satellite service rules are simply an extension of the strict Commission cut-off policies that have long governed filings in a variety of Commission services. In Space Station Application Filing Procedures, the Commission specifically stated that the cut-off procedures being adopted in the Domestic Fixed Satellite Service were "similar to those used in other regulated services." See 48 Fed. Reg. 40256 and 40257. By way of example, the Commission in that holding cites to Ranger v. FCC, a broadcasting case in which the U.S. Court of Appeals upheld the Commission's strict enforcement of its cut-off rules. See 294 F.2d 240 (1961). Therein, the court noted that the applicants were on notice of the cut-off date by which a completed application would need to be filed, and stated:

We think an applicant for a radio license who either ignores or fails to understand clear and valid rules of the Commission respecting the requirements for an application assumes the risk that the application will not be acceptable for filing.

Id. at 242.

original application(s) placed on public notice or with those timely filed in response thereto. Applicants such as CELSAT who forego the opportunity to file an application during the appropriate cut-off period must suffer the consequences of their actions -- dismissal of any late-filed applications.

C. Well-Established Law And Policy Precludes The Commission From Simply Reopening The Cut-Off Date For The Acceptance Of New Applications.

CELSAT, in its petition for rulemaking, simply requests that the Commission "reopen the cut-off date for new applications in the RDSS L/S-band." See CELSAT Petition at 4. However, CELSAT offers no explanation of its failure to timely file an application within the appropriate cut-off period, nor does it offer even one reason why the Commission should abandon its normal cut-off procedures.

The Commission has previously stated that strict enforcement of its cut-off requirements is necessary to "assure that all applicants are treated fairly and reasonably in their dealings with the Commission processes, and to guarantee that there is an identifiable point in time when the Commission can close the door to new applicants, thus assuring that the Commission can effectively and efficiently fulfill its public interest mandate." See Filing Deadlines: Waiver Procedures, 58

R.R. 2d 1706 (1985).^{5/} The Commission has also noted that in the application context, consideration of a late filed application is "generally" unfair to competitors and delays the provision of new service to the public." Memorandum Opinion and Order in MM Docket 85-211, 3 FCC Rcd 2336, 2337 (1988).^{6/}

Clearly, TRW and the other five parties who filed applications in compliance with the Commission's Rules would be prejudiced and unfairly burdened if the Commission simply reopened the cut-off period established in the RDSS-band Public Notice in order to allow CELSAT, and potentially other parties, to enter what has been a closed processing group for almost ten months. In addition, deviation without justification -- much less compelling justification -- from a longstanding policy of requiring strict adherence to filing deadlines would completely undermine the integrity of the cut-off rules, and would expose the Commission to an avalanche of similar requests.^{7/} Without a

^{5/} See also Mobile Services Division Applications, 66 R.R. 2d 1199, 1202 (1989) (policy of strict adherence to application filing deadlines remains intact despite adoption of limited flexibility for microfiche copies).

^{6/} See also City of Angels Broadcasting, Inc. v. FCC, 745 F.2d 656 (D.C. Cir. 1984) (cut-off rule grants applicants "protected status" and protects them from "opportunistic late-comers"); Ranger v. FCC, 294 FCC 2d at p. 244 (failure to observe cut-off date results in "loss of substantive rights").

^{7/} In fact, given the complete lack of explanation provided by CELSAT with regard to its failure to meet the original

(Footnote continued on next page)

fixed point in time at which the Commission could close the door to new parties, service to the public would be interminably delayed. Thus, reopening the cut-off period would be contrary to the public interest.^{8/}

**D. CELSAT Is Not Eligible For A Waiver Of The
Commission's Cut-Off Rule.**

As discussed above, CELSAT has neither applied to use the RDSS frequencies nor requested a waiver of the Commission's cut-off rule. However, if its mere request for a "reopening of the cut-off period" were construed as a request for a waiver, such a request would be woefully inadequate.

(Footnote continued from previous page)

^{7/} filing deadline, if the Commission were to reopen the cut-off period, it would be hard pressed to justify the denial of any future requests by late filed applicants for similar relief. See Green Country Mobilephone, Inc. v. FCC, 765 F.2d 235, 238 (D.C. Cir. 1985) (absence of principled distinction between two cases of delay prohibited discriminatory strict enforcement of the cut-off rules). See also Melody Music v. FCC, 345 F.2d 730 (D.C. Cir. 1965).

^{8/} The Court of Appeals for the District of Columbia Circuit has recognized that the Commission may properly employ such cut-off procedures. Committee for Open Media v. FCC, 543 F.2d 861, 873 & n.79 (D.C. Cir. 1976) construing Ashbacker Radio Corp. v. FCC, 326 U.S. 327, 333 & n.9 (1945). Only by compliance with such procedures may the applicant enter the ranks of bona fide applications protected by Ashbacker. Maxcell Telecom Plus, Inc. v. FCC 815 F.2d 1551 (D.C. Cir. 1987) citing Reuters, Ltd. v. FCC, 781 F.2d 946, 951 (D.C. Cir. 1986).

In 1985, the Commission strengthened all of its cut-off rules, including those applicable to satellite applications, by releasing a Public Notice in which it announced that in the future it would adhere strictly to the standard that:

applicants seeking a waiver of Commission application filing deadlines [must] demonstrate unusual and compelling circumstances for their waiver requests. This standard will generally contemplate a showing that the untimely filing was caused by a calamity of a widespread nature that even the best of planning could not have avoided. Furthermore, it must be demonstrated that all reasonable steps were taken after the event which caused the delay to minimize or avoid further delay.

Waivers of Application Filing Deadlines, 58 R.R. 2d at 1707.

The Commission further noted that it would consider only "clearly unforeseeable circumstances as grounds for a waiver -- such as a debilitating earthquake or a city-wide power outage which brings transportation to a halt." Id. Thus, in the past, the Commission has refused to grant waivers of its cut-off rules for such reasons as inclement weather, failures of third party couriers, the applicant's absence from the United States, and lack of notice of conflicting applications filed during the cut-off period (daisy chain cases).^{2/}

^{2/} See, e.g., Mary Ann Salvatoriello, 69 R.R. 2d 881 (1991) (no waiver for absence from country and weather delay); Sierra-Shingle Springs Broadcasting, 3 FCC Rcd 1677 (1988),

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It is therefore clear that an applicant seeking a waiver of the Commission's cut-off rules has to surmount an extremely high hurdle.^{10/} It is also readily apparent that CELSAT has set forth no unusual or compelling facts indicating that its failure to file an application within the cut-off period was due to circumstances beyond its control. In fact, CELSAT has offered no explanation whatsoever for its failure to comply with the filing deadline.

It is also unlikely that CELSAT, at some later date, would be able to advance a plausible set of facts sufficient to justify a waiver. Given the fact that CELSAT filed a petition for rulemaking almost two months ago in which it represented that it was filing its satellite system application "contemporaneously" (CELSAT Petition at 1), but has yet to file

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^{9/} recon. denied sub nom. Tours Broadcasting Co., 5 FCC Rcd 1039 (1990) (no waiver for failure of mail service); Kenebec Valley Television, Inc., 3 FCC Rcd 4522, 4524 (1988) (no waiver for failure of overnight delivery service); Bryan Industrial Electronics, Inc., 60 R.R. 2d 1713 (1986) (no waiver for lack of notice of daisy chain conflict in PLMS service); Bill R. Wright, Inc., 102 F.C.C. 2d 1142 (1985) (no waiver for lack of notice of daisy chain conflict in LPTV service).

^{10/} See Mid-Missouri Mobilefone, 61 R.R. 2d 20, 24 (Common Carrier Bureau 1986) (citing Berks County Communications, Inc., Mimeo 4435, released June 8, 1982) (waivers of the cut-off rule will be limited only to the most extraordinary circumstances).

an application for the RDSS frequencies, it would be difficult for CELSAT to maintain that it has taken all reasonable steps to minimize or avoid further delays, regardless of whether it could establish that its initial failure to file was due to some calamity beyond its control. Thus, at this time, CELSAT is effectively cut-off from filing an application seeking the use of the RDSS frequencies called for in its petition for rulemaking.

II. CELSAT's Rulemaking Petition For An Allocation In The Frequencies At 2.1 And 2.4 GHz Is Similarly Ungrantable.

CELSAT's alternatively requested frequency allocations involve the use of its so-called Band-A frequencies at 2110 to 2129 MHz and 2410 to 2428 MHz. In its rulemaking petition, CELSAT noted that its proposed use of the Band-A frequencies was consistent with frequency allocation modification proposals being supported by the U.S. delegation at the 1992 World Administrative Radio Conference. Therefore, CELSAT requested that the Commission amend its table of frequency allocations, to adopt in their entirety those modifications. See CELSAT Petition at Exhibit 2.

However, because the position of the U.S. delegation with respect to these frequencies was not ultimately adopted at the WARC, the Band-A frequencies sought by CELSAT were not allocated internationally for mobile satellite use, on either a

regional or worldwide basis. Specifically, within Region 2 (which includes the United States), frequencies between 2110-2120 MHz and 2410-2428 MHz may not be used at all for mobile satellite service, while those between 2120-2129 MHz are only available for such uses on a secondary, non-interfering basis. See Addendum and Corrigendum to the Final Acts of World Administrative Radio Conference (WARC-92), at pp. 18, 20.

While the Commission could adopt modifications to its table of allocations inconsistent with those adopted by the WARC, any U.S. licensed satellite operator utilizing such frequencies for mobile satellite service would have to cease operation immediately in the event that harmful interference were caused to any entity utilizing those frequencies in the appropriate manner.^{11/} Therefore, a modification of the Commission's table of allocations to allow for construction of costly full service mobile satellite systems that could provide service on these frequencies only on a non-interfering basis

^{11/} International Telecommunication Union, Radio Regulation ("RR") No. 342 specifically states:

Administrations of the Members shall not assign to a station any frequency in derogation of either the Table of Frequency Allocations given in this Chapter or the other provisions of these Regulations, except on the express condition that harmful interference shall not be caused to services carried on by stations operating in accordance with the provisions of the Convention and of these Regulations.

would be impractical and ill advised, and CELSAT has not indicated that its system would be constructed on such a basis.

III. CELSAT's Rulemaking Petition Must Be Dismissed.

The Commission must dismiss CELSAT's rulemaking petition because the underlying proposal may not be effectuated, and the petition is therefore moot. Section 1.407 of the Commission's Rules states that if, upon consideration of a rulemaking petition, the Commission determines that a rulemaking proceeding is either not "justified" or "desirable" the petition for rulemaking will be denied.^{12/} Section 1.401(e) of the Commission's Rules further states that "petitions which are moot, premature, repetitive, frivolous, or which plainly do not warrant consideration by the Commission, may be denied or dismissed without prejudice to the petitioner." In adopting Section 1.401, the Commission noted that consideration of such petitions is administratively inefficient, results in costly and unnecessary effort on the part of both the public and the Commission's staff, and shifts the Commission's focus from matters where its attention would

^{12/} See 47 C.F.R. § 1.407. While Section 4(d) of the Administrative Procedures Act ("APA"), 5 U.S.C. § 553 (1976), provides that each agency shall give an interested person the right to petition for the issuance, amendment or repeal of a rule, the legislative history underlying the APA makes clear that "the mere filing of a petition does not require an agency to grant it, or to hold a hearing, or to engage in any other public rulemaking." Report of the Senate Subcommittee on the Judiciary on the APA, S. Rep. No. 785, 79th Cong., 1st Sess. 201 (1945).

prove more fruitful. See Petitions for Rulemaking, 47 R.R. 2d 1068, 1069 (1980). In addition, the Commission has denied rulemaking requests where the underlying proposal could not be effectuated in conformity with the Commission's other rules and policies.^{13/}

The Commission has recognized in other contexts that acceptance and consideration of later filed petitions for rulemaking which conflict with pending applications may disserve the public interest by further delaying service. See Notice of Proposed Rulemaking Re: Conflicts Between Applications and Petitions for Rulemaking to Amend the FM Table of Allotments 6 FCC Rcd 7346 (1991). Therein, the Commission noted that its procedures governing the processing of rulemaking petitions that conflict with pending applications result in additional expense to applicants and delay of service to the public, and that these burdens are not outweighed by countervailing benefits to the public. Id. at 7348. The Commission further observed that "the uncertainty inherent in this open-ended exposure to conflicting petitions is also a

^{13/} See, e.g., Amendment of Section 73.202(b) Sonora California, 6 FCC Rcd 6042 (1991); Amendment of Section 73.202(b) New Boston, Kentucky, 48 R.R. 2d 1628 (1981) (refusal to grant rulemaking request where FM service could not provide city grade coverage).

substantial deterrent to applications seeking to establish or improve service to the public." Id. at 7347.^{14/}

Because CELSAT is barred from filing a supporting application to utilize the RDSS (Band-B) frequencies at this time, further processing of its rulemaking proposal would be academic, and would serve only to burden the Commission's processes and delay the inauguration of service to the public from applicants already on file in the RDSS service. In addition, because the frequencies requested by CELSAT in Band-A could only be allocated by the Commission for use in the mobile satellite service on a non-interfering basis, they would not be suitable for use in conjunction with CELSAT's proposed full-service satellite system.

Clearly, CELSAT had notice of the pendency of applications and rulemaking petitions concerning the RDSS Band frequencies and could easily have advanced its proposal concurrently with those of other parties, by submitting it within the cut-off period.^{15/} CELSAT must not be allowed to

^{14/} The Commission also stated "these types of disruptions frustrate our goals both directly and indirectly, by increasing the cost and risk involved in seeking station authorizations." Notice of Proposed Rulemaking, 6 FCC Rcd at 7347.

^{15/} In addition, pursuant to Public Notice, Report Nos. 1855 & 14747, released August 13, 1991 and September 13, 1991

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circumvent the Commissions Rules and policies, cause undue prejudice to other parties, and delay both these proceedings and the start of service to the public simply because it chose not to file its proposal within the proper time frame.

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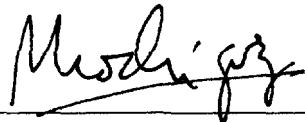
15/ respectively, the Commission established an October 16, 1991 deadline for the filing of comments relating to the various rulemaking petitions of TRW, Constellation, Ellipsat and AMSC concerning the allocation of RDSS frequencies at 1610 to 1626.5 MHz and 2483.5 to 2500 MHz. Despite notice, CELSAT failed to comment on the pending proceeding within this timeframe as well.

CONCLUSION

On the basis of the foregoing, TRW respectfully urges the Commission to find CELSAT's Petition for Rulemaking and ungrantable, and to dismiss the petition without further consideration.

Respectfully submitted,

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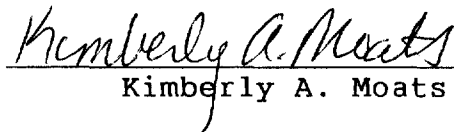
April 8, 1992

Its Attorneys

CERTIFICATE OF SERVICE

I, Kimberly A. Moats, hereby certify that true copies of the foregoing "Petition To Dismiss Rulemaking Request of CELSAT, Inc." was served by first-class mail, postage prepaid, this 8th day of April, 1992 on the following:

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Kimberly A. Moats